IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF	)	NO. 45426-2-II
MICHAEL WHEELER	)	SUPPLEMENTAL REPLY TO STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

Comes now, Michael Wheeler, Petitioner, by and through his attorney of record, Michael E. Schwartz, and files it's Reply to the State's Response to his Personal Restraint Petition pursuant to RAP 16.9.

I. ISSUE RAISED

This court has ordered supplemental briefing in this matter addressing whether Wheeler's Judgment and Sentence is facially invalid.

Michael Wheeler seeks relief from Personal Restraint imposed for his 2000 Thurston County conviction for Failing to Register as a Sex Offender, based on the predicate conviction, in 1985, of Third Degree Rape of a Child. Mr. Wheeler claims that, based on the Court of Appeals opinion in State v. Taylor, 162 Wn.App. 791, 259 P.3d 289 (2011), his conviction is invalid. The Taylor court found that the definition of a sex offense did not include the crime for which Taylor was convicted (Third Degree Statutory Rape) and

therefore, the State could not prove all the essential elements of the offense. Taylor, 162 Wn. App. at 800.

RCW 10.73.090(1) states: "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face . . ." In Mr. Wheeler's case, the statute under which he was convicted in 1985 (Third Degree Statutory Rape) was repealed in 1988, Laws of 1988, Chapter 145 § 24. The obligation to register as a sex offender did not become law until 1990, Laws of 1990, Chapter 3 § 402. Therefore, according to Taylor, Statutory Rape could not be a sex offense for purposes of the registration requirement. Id. at 795-96. In other words, Mr. Wheeler was convicted of a non-existent crime. As such, his Judgment and Sentence was invalid on its face and therefore the conviction should be vacated.

In In the Matter of the Personal Restraint Petition of Jesse Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), the Washington Supreme Court addressed this very issue. The Hinton court stated:

> Where is a defendant is convicted of a non-existent crime, the Judgment and Sentence is invalid on its face. Id. at 857.

In Hinton, Petitioners argued that they were not time barred under 10.73.010 in challenging their convictions for Second Degree Felony Murder when no statute had established a crime of Second Degree Felony Murder

based upon assault at the time that the petitioners committed the acts for which they convicted. In Hinton, the Supreme Court found that a conviction under former RCW 9A.32.050 which rested on an assault as the underlying felony is not a conviction of a crime at all. Hinton at 857.

The invalidity of Mr. Wheeler's Judgment and Sentence is clearly shown by his Judgment and Sentence which was attached to his original petition. Under Hinton, Mr. Wheeler's Judgment and Sentence is invalid on its face and therefore his Personal Restraint Petition is not subject to the one year time limit of RCW 10.73.090.

RESPECTFULLY SUBMITTED this 28th day of July, 2014.

LAW OFFICE OF MICHAEL SCHWARTZ, INC.

By: M. A. Schwartz
Michael Schwartz, WSBA #21824
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Reply to State's Response to Personal Restraint Petition on the date below as follows:

Electronically filed at Division II

TO: David C. Ponzoha, Clerk
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Carol La Verne, WSBA #19229
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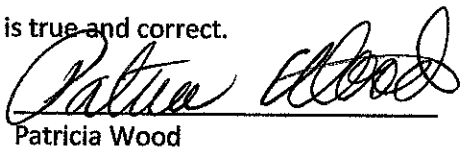
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.



Patricia Wood